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A Preemption Analysis of California's Moratorium on Nuclear Plant Construction: Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission

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A Preemption Analysis of California's Moratorium on Nuclear Plant Construction: *Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission*

After cancelling plans for the construction of nuclear power plants, Pacific Gas and Electric Co. and Southern California Edison Co. challenged the validity of California legislation regulating nuclear power.[1] The utilities alleged that the restrictive provisions of the California Nuclear Laws[2] and other sections of the Warren-Alquist Act[3] had forced them to abandon their projects. Finding that the state statutes regulated radiation hazards associated with the use of nuclear power, the district court held that the federal Atomic Energy Act[4] preempted the challenged state provisions.[5] On appeal, the Ninth Circuit[6] re-

1. Warrren-Alquist State Energy Resources Conservation and Development Act, ch. 276, § 2, 1974 Cal. Stat. 501 (codified as amended at CAL. PUB. RES. CODE §§ 25000-25986 (West 1977 & Supp. 1981)).

2. CAL. PUB. RES. CODE §§ 25524.1-.3 (West 1977 & Supp. 1981). The Nuclear Laws, which imposed three independent moratoriums on the certification of nuclear plant construction, were amendments to the Warren-Alquist Act. Section 25524.1 applied only to proposals involving reprocessing of nuclear fuel rods. Section 25524.2 imposed a moratorium effective until California determines that a federally approved method of nuclear waste disposal exists, *see infra* note 57. Section 25524.3 required the California Energy Commission to prepare a study on the feasibility of undergrounding and berm containment, processes essentially burying nuclear facilities underground for safety purposes, prior to certification of any proposed facilities.

3. CAL. PUB. RES. CODE §§ 25000-25986 (West 1977 & Supp. 1981).

4. 42 U.S.C. §§ 2011-2282 (1976 & Supp. III 1979).

5. Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 489 F. Supp. 699 (E.D. Cal. 1980). The district court invalidated California Public Resources Code sections 25500, 25502, 25503, 25504, 25511, 25512, 25514, 25516, 25517, 25519, 25520, 25523, 25528, 25532, in addition to all of the Nuclear Laws. *Id.* §§ 25524.1-.3.

6. The Ninth Circuit consolidated two cases: the appeal from the utlities' successful challenge of the California legislation, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 489 F. Supp. 699 (E.D. Cal. 1980), and an appeal from a district court decision invalidating one of the three moratoriums imposed by the California Nuclear Laws, Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n, 472 F. Supp. 191 (S.D. Cal. 1979). The Ninth Circuit remanded the latter case, reversing the district court's summary judgment decision that the plaintiff had standing. Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n, 659 F.2d 903, 911-14, 928 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3861 (U.S. April 20, 1982) (No. 81-1944).

fused to consider the preemptive invalidity of most of the contested statutes on nonjusticiability grounds.[7] The court, however, applied a preemption analysis[8] to the California Nuclear Law that imposed a moratorium on the certification of new nuclear facilities until California determined that a federally approved method of high-level nuclear waste disposal existed.[9] The Ninth Circuit reversed, *holding* that the state legislature enacted the moratorium for purposes other than protection against radiation hazards and, consequently, that it was not preempted by the Atomic Energy Act. *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903 (9th Cir. 1981).

Although it is clear that federal law has supremacy over state law if the two are incompatible,[10] determining whether the scope and extent of a particular federal law precludes or preempts a state statute is often difficult.[11] Federal preemption

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7. 659 F.2d 903, 915-18. The court concluded that the first moratorium of the Nuclear Laws, *see supra* note 2, and most of the challenged provisions of the Warren-Alquist Act, *see supra* note 5, were not ripe for review. *Id.* It also held that the controversy surrounding the third moratorium of the Nuclear Laws was moot, because the study required by that provision had been completed. *Id.* at 917-18.

8. *Id.* at 919-28.

9. CAL. PUB. RES. CODE § 25524.2 (West 1977). The court also applied preemption analysis to a requirement of the Warren-Alquist Act that utilities applying for certification of new nuclear projects submit three alternative sites for the proposed facility. *Id.* § 25503 (West Supp. 1981). The court ruled that federal law did not preempt this provision. 659 F.2d at 925-26. Although many of the same preemption issues apply to both state moratoriums and siting requirements, this Comment will focus primarily on the moratorium. The federal government accepts siting requirements more readily because of the states' traditional zoning powers. *Id. See infra* notes 107-09 and accompanying text. *See generally* Northern Cal. Ass'n to Preserve Bodega Head & Harbor v. Public Util. Comm'n, 61 Cal. 2d 126, 133, 390 P.2d 200, 204, 37 Cal. Rptr. 432, 436 (1964). For general treatment of state power plant siting requirements and federal preemption, see Henderson, *The Nuclear Choice: Are Health and Safety Issues Preempted?*, 8 B.C. ENVTL. AFF. L. REV. 821 (1980); Note, *Nuclear Power Plant Siting: Additional Reductions in State Authority?*, 28 U. FLA. L. REV. 439 (1976). *See also* Granger & Wise, *A Critique of One-Stop Siting in Washington: Streamlining Review Without Compromising Effectiveness*, 10 ENVTL. L. 457 (1980).

10. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

11. The Supreme Court has used many expressions to describe the relationship of the invalidated state law to federal law: "contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible

clearly exists if a federal law explicitly prohibits concurrent state regulation. If, however, no federal law expressly prohibits a challenged state regulation, courts must determine whether Congress implicitly intended to forbid state legislation. In answering this difficult question, courts have used a two-part approach.[12] Courts first consider whether Congress has prohibited all state regulation by occupying the field of regulation in question.[13] This form of preemption, referred to as occupation preemption,[14] may be supported by the pervasiveness or complexity of the federal regulation[15] or the existence of a

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constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula." Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (footnotes omitted). The preemption decision ultimately rests on an interpretation of the relevant federal statute and the subject matter it regulates. Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

12. In Hines v. Davidowitz, 312 U.S. 52 (1941), the Supreme Court used a one-part approach. *See infra* text accompanying note 21. Recently, however, the Court has bifurcated the *Hines* test. *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151, 157-58 (1978); Jones v. Rath Packing Co., 430 U.S. 519, 524-26 (1976). *But cf.* Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317-19 (1981) (intimating a return to the *Hines* one-part preemption analysis). Although the *Hines* formulation of the preemption test seems to incorporate both, it has usually been cited as authority for only one part of the current two-part test. *See infra* notes 21-22 and accompanying text.

13. In Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), for example, the Court held that the federal Ports and Waterways Safety Act of 1972 preempted Washington state tanker-design standards. *Id.* at 160-68. The federal goals of vessel safety, protection of the marine environment, and international regulatory cooperation indicated a congressional intention not to allow concurrent state regulation, thus preempting all state tanker-design standards. *Id.* Using similar reasoning, the Court in Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), held that the United States Warehouse Act preempted all state regulation of federally licensed warehouses. *Id.* at 234.

14. Wiggins, *Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study,* 13 U.C.D. L. REV. 1, 30 (1979). Professor Tribe has also referred to this form of preemption as "jurisdictional preemption." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 377, 384 (1978).

15. *E.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The existence of independent federal regulatory agencies or federal licensing procedures may, for example, indicate that the federal regulation is comprehensive. *See, e.g.*, Local 20, Int'l Bhd. of Teamsters v. Morton, 377 U.S. 252 (1964) (existence of National Labor Relations Board supported preemption finding); First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946) (federal licensing procedures of the Federal Power Act preempted state power project requirements). *But see* Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) (state air pollution standards imposed on federally licensed ships not preempted). The pervasiveness or complexity of the federal regulation does not, itself, prove preemption; it is relevant only to support finding congressional intent to preempt. *See* New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 415 (1973). The pervasiveness of the federal regulation may also provide some indication to the courts that a preemption decision will not create a legislative vacuum. L. TRIBE, *supra* note 14, at 385.

dominant federal interest.[16] Courts have used three factors to establish the strength of the federal interest:[17] whether Congress has discouraged or promoted state regulation of the subject matter;[18] whether the challenged legislation transcends state lines;[19] and whether the state judgment is based on uniquely local factors, or factors common throughout the country.[20]

Under the second part of the approach, courts consider whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[21] This form of preemption, referred to as conflict preemption,[22] may occur if compliance with both state and fed-

16. Like the pervasiveness or complexity of the federal regulation, the strength of the national interest is relevant only in considering the preemptive intent of Congress. *See* DeCanas v. Bica, 424 U.S. 351, 363 (1976).

17. Maltz, *The Burger Court, The Regulation of Interstate Transportation, and the Concept of Local Concern: The Jurisprudence of Categories,* 46 TENN. L. REV. 406, 420-23 (1979).

18. *Id.* at 420. *See* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 445-46 (1960); Cooley v. Board of Wardens, 53 U.S. 143, 152-53 (1851).

19. Courts should not defer to state legislation because of conceptions of state sovereignty if the state imposes its judgment on other states. Maltz, *supra* note 17, at 421-22 (citing Bibb v. Navajo Freight Lines, 359 U.S. 520 (1950); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945)). *See also* Note, *A Framework for Preemption Analysis,* 88 YALE L.J. 363 (1978). *Cf.* First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946) (preempted state decision affected national navigation systems).

20. If the state responds to a uniquely local situation, its judgment presumptively rests on local expertise and thus demands respect. If the state addresses a national situation, however, it may lack the necessary expertise to entitle it to judicial deference. Maltz, *supra* note 17, at 422-23. *Cf.* Minnesota v. NRC, 602 F.2d 412, 417 (D.C. Cir. 1979) (nuclear waste disposal problems are common to all nuclear facilities).

21. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

22. Wiggins, *supra* note 14, at 42. Professor Tribe has alternatively called this type of preemption "substantive preemption." L. TRIBE, *supra* note 14, at 377.

As worded, the *Hines* test actually includes both conflict and occupation preemption. Since courts will not find either form of preemption unless the state contradicts congressional intent, both forms stand as an "obstacle" to the objectives of Congress. *See* L. TRIBE, *supra* note 14, at 377. Thus, the Court's bifurcation of preemption analysis, *see supra* note 12 and accompanying text, may be artificial and confusing. *See infra* notes 130, 136, 146. In Jones v. Rath Packing Co., 430 U.S. 519 (1977), for example, the Supreme Court cited *Hines* as precedent for the conflict preemption analysis. *Id.* at 526. *Hines* itself, however, seems to be better characterized as an occupation preemption case; the Court invalidated a state alien registration law because the federal legislation left no room for concurrent state regulation. Hines v. Davidowitz, 312 U.S. 52, 74 (1941). This does not mean that the Court was wrong in characterizing *Hines* as a conflict preemption case, since the state law in that case did conflict with the federal objective of precluding state regulation. It does show, however, that the two lines of inquiry cannot be easily distinguished, and may be useful only to the extent they involve separate policy considerations. *See infra* note 125.

eral law is impossible,[23] or if the state law frustrates a congressional goal.[24] The Supreme Court has intimated that conflict preemption may not exist if the state and federal laws have different purposes, even though the laws appear to conflict.[25] Under this exemption, however, the conflict must be only incidental to the divergent purposes of the laws.[26]

In recent years, the Supreme Court has appeared less willing to find either form of preemption,[27] and has occasionally suggested that there is a presumption against preemption.[28] When considering occupation preemption, if the challenged state legislation is in a field traditionally within the powers of the states, the Court will not infer preemption unless that is "the clear and manifest purpose of Congress."[29] Similarly, the Court has said that conflict preemption is inappropriate if chal-

23. *See, e.g.*, Free v. Bland, 369 U.S. 633 (1962).

24. For example, in Jones v. Rath Packing Co., 430 U.S. 519 (1977), the Court concluded that a federal law preempted a California packaging law because the state law did not consider moisture variations, which frustrated the intent of Congress to provide for proper consumer comparison.

25. *See* Merrill Lynch, Pierce, Fenner & Smith v. Ware, Inc., 414 U.S. 117, 139 (1973) (holding no preemption partially because of different purposes); Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 445-48 (1960) (state law to control air pollution not preempted by federal law to ensure safety of sea-going vessels). *Cf.* Ray v. Atlantic Richfield Co., 435 U.S. 151, 164-65 (1978) (similarity of purposes supports a preemption finding). Although the Court has never expressly endorsed this doctrine, several commentators have suggested that it is an important factor in the preemption decision. *See* Tribe, *California Declines the Nuclear Gamble: Is Such a State Choice Preempted?*, 7 ECOLOGY L.Q. 679, 688-92 (1978); Wiggins, *supra* note 14, at 50. Courts may have created the difference of purposes consideration to weigh conflicting policies under an otherwise inflexible test. Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 628-30 (1975).

26. *See* Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). In *Northern States*, the Eighth Circuit rejected the state's difference of purpose argument since the purposes of the state and federal law were "inextricably intertwined." *Id.* at 1153. *Cf.* Note, *supra* note 25, at 629, 649 (difference of purpose preserves only "peripheral" conflict from preemption).

27. *See* Note, *supra* note 25.

28. Determining whether these presumptions have ever affected the Court's ultimate decision is difficult. The Supreme Court has not consistently preserved state laws from preemption, even in cases in which the preemptive intent of Congress was uncertain. *See, e.g.*, Chicago & N.W. Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978).

29. Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978). If the field of regulation is traditionally national, however, the Court is less likely to presume the validity of the state legislation. L. TRIBE, *supra* note 14, at 385-86 (citing Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972) (state regulation of nuclear power)). *See also* Hines v. Davidowitz, 312 U.S. 52 (1941) (state regulation of aliens preempted).

lenged state laws are not clearly repugnant to federal law.[30] These presumptions insure that the federal-state regulatory balance will not be disturbed unintentionally by Congress or unnecessarily by the courts.[31]

The federal government has regulated nuclear power since the end of World War II.[32] The federal monopoly over nuclear science ended in 1954, when Congress, growing aware of the extensive nonmilitary value of nuclear science, passed the Atomic Energy Act.[33] Intended to encourage the development and use of nuclear energy in cooperation with private industry,[34] the Act provided for the licensing of privately owned nuclear power plants,[35] and allowed private parties to possess, use, and transfer nuclear materials.[36] The Act tempered the goal of encouraging the private development of nuclear power with a concern

30. Merrill Lynch, Pierce, Fenner & Smith v. Ware, Inc., 414 U.S. 117, 139 (1973). Preemptive conflict must be actual and substantial. *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 489-92 (1974); New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 423 n.29 (1973).

31. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Courts may also be reluctant to find preemption if invalidation of the state law would create a legislative vacuum. Although it is less likely that there will be a resultant legislative vacuum in conflict preemption cases, because the conflict itself indicates that a vacuum will not result, if the laws have different purposes, *see supra* note 25 and accompanying text, a court may not wish to strike down a state law, leaving its purpose unfulfilled. *See* Tribe, *supra* note 25, at 692 n.65. *See generally id.* at 690.

32. Atomic Energy Act of 1946, ch. 724, 60 Stat. 755 (current version at 42 U.S.C. §§ 2011-2282 (1976 & Supp. III 1979)). Considering the state of nuclear science following World War II "there was no reason to provide for or even to contemplate state regulation of atomic energy." Murphy & LaPierre, *Nuclear "Moratorium" Legislation in the States and the Supremacy Clause: A Case of Express Preemption*, 76 COLUM. L. REV. 392, 395 (1976).

33. Ch. 1073, 68 Stat. 919 (1954) (codified as amended at 42 U.S.C. §§ 2011-2282 (1976 & Supp. III 1979)).

34. 42 U.S.C. §§ 2011-2013 (1976). The Joint Committee on Atomic Energy believed that

> the goal of atomic power at competitive prices will be reached more quickly if private enterprise, using private funds, is now encouraged to play a far larger role in the development of atomic power . . . . [W]e do not believe that any developmental program carried out solely under governmental auspices, no matter how efficient it may be, can substitute for the cost-cutting and other incentives of free and competitive enterprise.

S. REP. NO. 1699, 83d Cong., 2d Sess. 3, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 3456, 3459.

35. 42 U.S.C. §§ 2131-2141 (1976 & Supp III 1979).

36. 42 U.S.C. §§ 2073, 2092, 2111 (1976). Section 2012 of the Act, however, clearly stated that licensing of private industry did not divest the federal government of control over nuclear power. The licensing procedures, in fact, expanded the responsibilities of the federal government by placing the development and operation of private industry under its control. *Id.* § 2012(c), (f).

for public health and safety.[37] Although the federal government retained complete authority to regulate the nuclear industry, section 271 of the Act clearly provided that the states retained their traditional authority to regulate the use of electrical power, including power produced by nuclear facilities.[38] This authority encompassed the power to control the generation, local distribution, and intrastate transmission of electricity.[39]

The development of the private nuclear industry after the passage of the Atomic Energy Act of 1954 intensified state interest in nuclear power regulation.[40] To clarify the roles of state and federal governments, Congress amended the Atomic Energy Act in 1959 by adding section 274.[41] Section 274(b) authorizes agreements between the Atomic Energy Commission (AEC) and states to transfer regulatory authority over byproduct, source, and special nuclear materials to the states.[42] Under these agreements, the states have authority to enact regulations for the "protection of the public health and safety from

37. *E.g.*, 42 U.S.C. §§ 2012(i), 2201(b) (1976). To eliminate the apparent conflict of interest between promoting nuclear power and limiting its use for safety reasons, the Energy Reorganization Act of 1974 separated the regulatory and promotional functions of the AEC. 42 U.S.C. §§ 5801-5891 (1976 & Supp. 1979). The Act transferred the power to regulate and license nuclear facilities to the new Nuclear Regulatory Commission (NRC) and shifted responsibility for the promotion of nuclear power and all other energy sources to the new Energy Research and Development Administration (ERDA). *Id.* § 5801(a). By dividing these sometimes conflicting functions, Congress hoped that the new federal agencies could vigorously pursue their objectives while effectively monitoring each other. *See* S. REP. NO. 980, 93d Cong., 2d Sess. 1, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5470. Congress has since transferred the functions of ERDA to the Department of Energy. Department of Energy Organization Act of 1977, 42 U.S.C. §§ 7101-7352 (Supp. III 1979).

38. 42 U.S.C. § 2018 (1976) provides:

> Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State, or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission: *Provided*, That this section shall not be deemed to confer upon any Federal, State, or local agency any authority to regulate, control, or restrict any activities of the Commission.

39. Jersey Cent. Power & Light Co. v. Federal Power Comm'n, 129 F.2d 183, 194 (3d Cir. 1942).

40. *See* Murphy & La Pierre, *supra* note 32, at 398-99.

41. Act of September 23, 1959, Pub. L. No. 86-373, § 1, 73 Stat. 688, 688-91 (codified as amended at 42 U.S.C. § 2021 (1976)). *See* S. REP. No. 870, 86th Cong., 1st Sess. 4-5, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2872, 2875.

42. 42 U.S.C. § 2021(b) (1976). *See also id.* § 2014(e), (z), (aa) (definitions of byproduct, source, and special nuclear material). The NRC has entered into section 274 "turnover" agreements with twenty-six states. *See* U.S. NUCLEAR REGULATORY COMMISSION, 1980 ANNUAL REPORT 161.

radiation hazards."[43] The AEC cannot, however, transfer all of its authority. Section 274(c) requires continued and exclusive federal authority over "more" hazardous materials and activities, including construction and operation of nuclear facilities, export or import of byproduct, source, or special nuclear material, disposal of nuclear wastes at sea, and disposal of other hazardous materials that, according to the AEC, warrant federal licensing.[44] Section 274(k) preserves state authority, independent of any agreement authorized under section 274(b), to regulate "activities for purposes other than protection against radiation hazards."[45]

Northern States Power Co. v. Minnesota[46] is the leading federal preemption case dealing with nuclear power regulation. In *Northern States*, the Eighth Circuit held that section 274 of the Atomic Energy Act preempted a Minnesota law imposing radioactive emission standards stricter than the AEC's standards.[47] Concluding that "the states possess no authority to regulate radiation hazards unless pursuant to the execution of an agreement surrendering federal control . . . authorized under § [274](b),"[48] the Eighth Circuit reasoned that section 274 was an explicit demonstration of congressional intent to occupy the field encompassing the regulation of radiation hazards.[49] The court supported its finding of occupation pre-

43. 42 U.S.C. § 2021(b) (1976). Prior to the execution of section 274(b) agreements, the AEC retains the responsibility for regulating byproduct, source and special nuclear materials. Absent an agreement, state regulatory authority does not include protection of the public health and safety from radiation hazards. S. REP. No. 870, 86th Cong., 1st Sess. 9-11, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2872, 2879-80. The state must exercise its authority under a section 274(b) agreement in a manner that is "coordinated and compatible" with the federal regulations. 42 U.S.C. § 2021(g) (1976). Both the legislative history of section 274 and the AEC's guidelines indicate that the state standards are compatible only if they are virtually identical to the federal standards. S. REP. No. 870, 86th Cong., 1st Sess. 9, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2872, 2879.

44. 42 U.S.C. § 2021(c) (1976). Congress prevented transfer of regulatory authority over these matters because it believed that the technical safety considerations would be beyond the technical competence of the states. S. REP. No. 870, 86th Cong., 1st Sess. 3-4, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2872, 2874.

45. 42 U.S.C. § 2021(k) (1976) provides: "Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."

46. 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

47. 447 F.2d at 1154.

48. *Id.* at 1149-50.

49. *Id.* at 1151. In addition to examining the statutory language itself, the Eighth Circuit extensively referred to the legislative history of the 1959 amendments, and cited, for example, a Senate report that said: "'[Section 274] is not

emption by noting the pervasiveness of the federal regulation[50] and the need for uniform control of nuclear power regulation.[51] Furthermore, the court noted that states might "be so overprotective in the area of health and safety as to unnecessarily stultify the industrial development and use of atomic energy." The court recognized that this danger of conflict preemption might upset the proper federally-determined balance between safety and promotion.[52]

The California legislature's efforts to regulate the nuclear industry intensified in 1974, when it passed the Warren-Alquist Act.[53] Aimed at ensuring a continued source of electrical power for California,[54] the Act requires state certification of any new nuclear facilities.[55] In 1976, however, the legislature enacted the Nuclear Laws, which contained three moratoriums

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intended to leave any room for the exercise of dual or concurrent jurisdiction by States to control radiation hazards by regulating byproduct, source, or special nuclear materials.'" *Id.* (citing S. REP. No. 870, 86th Cong., 1st Sess. 9, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2872, 2879 (comments of the Joint Committee on Atomic Energy) (emphasis omitted)).

50. 447 F.2d at 1152-53. The Eighth Circuit cited authority describing the federal regulation of nuclear power as "'extraordinarily pervasive, probably more pervasive than any regulatory scheme considered by the Supreme Court.'" *Id.* at 1153 (quoting E. STASON, S. ESTEP & W. PIERCE, ATOMS AND THE LAW 1059 (1954)). The court also referred to the comprehensive licensing procedures of the AEC. *Id.*

51. 447 F.2d at 1153-54. The court relied on 42 U.S.C. § 2012 (1976), which recited congressional findings that the national interest requires federal regulation of nuclear power.

52. *Id.* at 1154. *But see* Tribe, *supra* note 25, at 695 n.85.

The Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat 685 (1977) (codified in scattered sections of 42 U.S.C. §§ 7401-7462 (Supp. III 1979)), which gave states the authority to regulate radioactive atmospheric emissions, *see infra* note 83, makes *Northern States* inapplicable to cases involving state regulation of these emissions. A number of courts, however, have affirmed *Northern States*'s preemption analysis in cases involving other aspects of nuclear power. *See, e.g.,* United States v. City of New York, 463 F. Supp. 604 (S.D.N.Y. 1978); Commonwealth Edison Co. v. Pollution Control Bd., 5 Ill. App. 3d 800, 284 N.E.2d 342 (1972); New Jersey Dep't of Envtl. Protection v. Jersey Cent. Power & Light Co., 69 N.J. 102, 351 A.2d 337 (1976).

53. Warren-Alquist State Energy Resources Conservation and Development Act, ch. 276, § 2, 1974 Cal. Stat. 501 (codified as amended at CAL. PUB. RES. CODE §§ 25000-25986 (West 1977 & Supp. 1981)).

54. CAL. PUB. RES. CODE §§ 25001-25008 (West 1977 & Supp. 1981).

55. The certification process is extensive and well-defined. Any utility contemplating construction of a nuclear facility must file a notice of intention. The notice may be approved only after extensive hearings and recommendations. After approval of the notice, a utility must submit a proposal which, if approved under a similar process, leads to certification of the project. *Id.* §§ 25500-25542. In the notice and proposal, the utility must include three alternate sites for the proposed facility, two of which must normally be acceptable to the California Energy Commission. *Id.* §§ 25502-25504. *See supra* note 9.

on the certification of new nuclear facilities.[56] The Nuclear Laws included a provision imposing a moratorium effective until the California Energy Commission determines that a federally approved method of high level nuclear waste disposal exists.[57] The legislature enacted this moratorium, together with the other provisions of the Nuclear Laws, as an alternative to the California Nuclear Initiative, a voter referendum also known as Proposition 15.[58] Unlike the Nuclear Laws, Proposition 15 would have halted the further development and future use of nuclear power until the California Assembly decided that radioactive wastes could "be stored or disposed of, with no reasonable chance" of adversely affecting the people or land of the state.[59] The enacted moratorium, however, put the primary burden on the federal government to determine that the risks of nuclear waste disposal were not unreasonable; California only had to certify that the federal government made the requisite safety decision.[60]

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56. Chs. 194-196, 1976 Cal. Stat. 3741 (codified as amended at CAL. PUB. RES. CODE §§ 25524.1-.3 (West 1977 & Supp. 1981)). *See supra* note 2 and accompanying text.

57. Section 25524.2 provides in part:

> No nuclear fission thermal power plant . . . shall be permitted land use in the state, or where applicable, be certified by the commission until . . . :
>
> (a) The commission finds that there has been developed and that the United States through its authorized agency has approved and there exists a demonstrated technology or means for the disposal of high-level nuclear waste.

CAL. PUB. RES. CODE § 25524.2 (West 1977 & Supp. 1981). This was the only California moratorium that the Ninth Circuit subjected to preemption analysis in *Pacific Legal Foundation*. *See supra* note 7 and accompanying text.

58. 659 F.2d at 924. The Nuclear Laws stipulated that they would be ineffective if the electorate passed Proposition 15, but due to the legislative action the referendum was voted down. *Id.* at 924 n.33.

59. Nuclear Power Plants-Initiative Statute § 76503(b)(2), *reprinted in* THE CALIFORNIA NUCLEAR INITIATIVE 217 (W. Reynolds ed. 1976). Unless the California legislature certified that all nuclear reactor safety systems were effective, that permanent nuclear waste disposal was safe, and that the federal government removed the limited liability granted the nuclear industry by the Price-Anderson Act, 42 U.S.C. § 2210 (1976 & Supp. III 1980), Proposition 15 would have prohibited certification of new nuclear facilities and would have required the complete termination of existing California nuclear facilities by 1987. Barton & Meyers, *The Legal and Political Effects of the California Nuclear Initiative,* in THE CALIFORNIA NUCLEAR INITIATIVE, *supra*, at 1-3. The Atomic Energy Act might have explicitly preempted Proposition 15 because of the referendum's purposeful regulation of radiation hazards. *See* Murphy & La Pierre, *supra* note 32, at 445-50. *But see* Hays, *State Power to Ban Nuclear Plants: The California Initiative as a Case in Point*, 6 ENVTL. L. 729 (1976) (preemption analysis of Proposition 15).

60. CAL. PUB. RES. CODE § 25524.2 (West 1977). Section 25524.2(b) allows the California legislature to overrule a California Energy Commission determination that a federally approved method of nuclear waste disposal exists. The

The California legislature claimed that the objective of the nuclear waste moratorium was economic, rather than safety-related.[61] It argued that the absence of a federally approved, permanent disposal method for high level nuclear waste was a "stipulated" economic problem because it created a "clog" in the nuclear fuel cycle.[62] This exposed the nuclear industry to escalating costs for temporary storage and uncertain future expenses.[63] Because it eschewed a safety rationale and professed to rely on an economic rationale, the California Assembly argued that its bill, in contrast to Proposition 15, regulated nuclear power for purposes other than protection against radiation hazards.[64]

The purposes underlying the California moratorium significantly affected the Ninth Circuit's preemption analysis of the Atomic Energy Act in *Pacific Legal Foundation*. After thoroughly treating the standing and justiciability issues,[65] the court focused on two sections of the federal Act[66] to determine the field of occupation preemption.[67] The court ruled that the preemptive effect of section 274(c), mandating exclusive federal authority over serious radiation hazards,[68] is limited by sections 271[69] and 274(k),[70] which narrow the field of occupation preemption to "regulations directed at radiation hazards."[71]

California legislature could conceivably conclude that the moratorium was still effective notwithstanding federal approval, if the federal resolution of the issue was not satisfactory to California. ASSEMBLY COMMITTEE ON RESOURCES, LAND USE, AND ENERGY, REASSESSMENT OF NUCLEAR ENERGY IN CALIFORNIA 155 (1976) [hereinafter cited as REASSESSMENT]. The California Assembly committee described the moratorium in contradictory terms, making it unclear whether the commission or the legislature, in certifying the federal approval, could examine the propriety of the federal decision. *Compare* REASSESSMENT, *supra*, at 156 ("ask only that a method be chosen and accepted by the federal government") *with* REASSESSMENT, *supra*, at 155 ("to the satisfaction of the State").

61. REASSESSMENT, *supra* note 60, at 18.

62. *Id.* at 18, 154. *But see id.* at 3, 12, 67-71 (contesting the seriousness of the waste disposal problem by characterizing high-level nuclear waste disposal as an "alleged" problem).

63. *Id.* at 27-28. California's economic rationale for the moratorium was described only briefly and summarily.

64. *Id.* at 18.

65. 659 F.2d at 910-18. *See supra* notes 6-7 and accompanying text.

66. 659 F.2d at 920. The court focused on 42 U.S.C. §§ 2018, 2021 (1976). *See supra* notes 38-45 and accompanying text.

67. *See supra* notes 13-20 and accompanying text.

68. 42 U.S.C. § 2021(c) (1976). *See supra* note 44 and accompanying text.

69. 42 U.S.C. § 2018 (1976). *See supra* note 38 and accompanying text. The court ruled that section 2018 permitted the states "to treat nuclear plants exactly as they would all other power plants." 659 F.2d at 921 (citing 100 CONG. REC. 12015-16, 12197-200 (1954)).

70. 42 U.S.C. § 2021(k) (1976). *See supra* note 45 and accompanying text.

71. 659 F.2d at 921.

Noting the states' authority to regulate environmental[72] and economic[73] aspects of nuclear power, the court adopted the literal language of section 274(k),[74] and stated that state legislation enacted for purposes other than protection from radiation hazards is explicitly authorized.[75]

Turning to the California moratorium, the Ninth Circuit in *Pacific Legal Foundation* discussed whether the law was a purposeful regulation of radiation hazards.[76] Contrasting the waste disposal moratorium with Proposition 15, the court accepted the California Assembly committee's assertion that the law dealt only with the "stipulated" economic problem of the "clogged" fuel cycle, and not with any safety-related issues.[77] Since the California legislature designed the moratorium to address the economic uncertainties of the nuclear fuel cycle, the Ninth Circuit held that the moratorium did not purposefully regulate radiation hazards and, therefore, was not in the field preempted by Congress.[78]

The Ninth Circuit then considered whether the California moratorium nevertheless conflicted[79] with the purposes and objectives of the federal legislation.[80] The court reasoned that Congress limited the promotional goal of the Atomic Energy Act by giving the states some regulatory authority in sections

72. *Id.* at 922. Prior to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (1976), which required the NRC to consider environmental issues, the AEC considered the states to have exclusive authority to enact environmental regulations. *See, e.g.*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 531 & n.10 (1978); New Hampshire v. AEC, 406 F.2d 170, 175-76 (1st Cir.), *cert. denied,* 395 U.S. 962 (1969).

73. 659 F.2d at 923 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 550 (1978)). The Price-Anderson Act, 42 U.S.C. § 2210 (1976 & Supp. III 1980), however, restricts the states' ability to regulate economic aspects of nuclear power because it limits liability for nuclear facilities.

74. *See supra* note 45.

75. 659 F.2d at 922. The Ninth Circuit conceded, however, that the federal regulation would preempt a state law, even though the state law was enacted for purposes other than protection against radiation hazards, if the two laws were in direct conflict. "If the NRC required a nuclear plant to be constructed in a certain way for safety reasons, for example, a state could not require the plant to be constructed some other way for environmental reasons." *Id.* at 922 n.29. *See infra* notes 79-85 and accompanying text.

76. 659 F.2d at 923-25.

77. *Id.* at 924-25 (citing REASSESSMENT, *supra* note 60, at 154). The Ninth Circuit emphasized the lack of disagreement concerning the seriousness or existence of the problem. *Id. But see supra* note 62.

78. 659 F.2d at 925.

79. *See supra* notes 21-26 and accompanying text.

80. 659 F.2d at 926-28. *See supra* notes 34-37 and accompanying text.

271 and 274(k).[81] The court suggested that Congress has further qualified its promotional objective by legislation enacted since 1954. That legislation ensures a balanced approach to the development of all energy sources[82] and explicitly permits states to regulate certain aspects of nuclear power.[83] Because of these limitations on the promotional goal of the Atomic Energy Act and the presumption supporting state legislation not clearly preempted,[84] the court ruled that the California moratorium did not conflict with the objectives of the federal legislation and, therefore, was a valid exercise of state authority.[85]

In defining the field of occupation preemption to include only those state regulations enacted for the purpose of controlling radiation hazards,[86] the Ninth Circuit misinterpreted the congressionally intended field of preemption. Although the language of section 274(k) supports the court's emphasis of the purpose of the California moratorium,[87] the legislative history of section 274(k) suggests that Congress intended to preempt a broader range of state regulations. As initially proposed, section 274(k) explicitly preempted any state law "*concerning* [the] control of radiation hazards."[88] Congress omitted this

81. 659 F.2d at 926.

82. To support this contention, the Ninth Circuit cited the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (1976 & Supp. III 1979) (transferring the Commission's promotion function to ERDA), and the Federal Nonnuclear Energy Research and Development Act of 1974, 42 U.S.C. §§ 5901-5917 (1976 & Supp. III 1979) (directing ERDA to develop and promote alternatives to nuclear energy). 659 F.2d at 926-27. *See also supra* note 37.

83. The Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified in scattered sections of 42 U.S.C. §§ 7401-62 (Supp. III 1979)), allows states to regulate radioactive emission standards for nuclear plants, and thus is one limitation on the ability of ERDA to promote the use of nuclear power. *See supra* note 52. In fact, the NRC has acknowledged that states which legislate under this Act may set standards that would prevent the operation of nuclear plants. *E.g.,* Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2, ALAB-453), 7 N.R.C. 31, 34 & n.13 (1978). In addition, the NRC Authorization and Appropriations Act for Fiscal Year 1980, Pub. L. No. 96-295, 94 Stat. 780 (1980), authorizes the states to impose nuclear facility siting and land use requirements more stringent than those of the NRC. *Id.* § 108(f).

84. Pacific Legal Found. v. State Energy Resources Conservation & Dev. Comm'n, 659 F.2d at 928. *See supra* notes 30-31 and accompanying text.

85. 659 F.2d at 926-28.

86. *See supra* notes 74-75 and accompanying text.

87. *See supra* note 45.

88. S. 2568 & H.R. 8755, 86th Cong., 1st Sess., *reprinted in Federal-State Relationships in the Atomic Energy Field: Hearings Before the Joint Committee on Atomic Energy*, 86th Cong., 1st Sess. 486, 488 (1959) (emphasis added). The proposal provided: "State laws and regulations concerning control of radiation hazards from byproduct, source, and special nuclear materials shall not be applicable except pursuant to an agreement entered into with the Commission . . . ."

language because it wanted to allow the courts to make their preemption decisions "in the light of all the provisions and purposes of the Atomic Energy Act, rather than in light of a single sentence."[89] In this way, Congress intended to give courts a "latitude of interpretation" to validate state legislation having only an incidental effect upon the control of radiation hazards.[90] Thus courts arguably should not narrowly apply section 274(k) by focusing only on the purpose of state legislation. After ensuring that the legislative purpose is not to control hazardous materials, the court should determine whether the statute has more than an incidental effect on the control of radiation hazards.[91]

This occupation preemption test is consistent with the "purpose" language of the statute, because consideration of purpose or effect should result in the same conclusion. Most state regulations of nuclear power enacted for "purposes other than protection against radiation hazards"[92] only incidentally control such hazards, and would therefore be outside the preempted field under either test. For example, state regulations that apply to all energy sources, such as statutes governing siting, zoning, local pollution, or working conditions unrelated to radiation concerns,[93] would normally be enacted

89. A.R. Luedecke, General Manager of the AEC, explained the omission as follows:

> Our sole purpose was to leave room for the courts to determine the applicability of particular State laws and regulations dealing with matters on the fringe of the preempted area in the light of all the provisions and purposes of the Atomic Energy Act, rather than in light of a single sentence.
>
> For example, in the absence of the sentence, the courts might have greater latitude in sustaining certain types of zoning requirements which have purposes other than control of radiation hazards, even though such requirements might have an incidental effect upon the use of source, byproduct, and special nuclear materials licenses [sic] by the Commission.

Id. at 500 (letter to Senator Clinton Anderson, Chairman, Joint Committee on Atomic Energy).

90. *Id.* at 493 (statement of Robert Lowenstein of the General Counsel's Office).

91. *Cf.* Tribe, *supra* note 25, at 702 ("[E]ven if the states were deemed to be preempted from regulating nuclear energy activity for purposes of protection against radiation hazards, state regulations should not be considered preempted if they implicate those concerns only incidentally."). Even the Ninth Circuit in *Pacific Legal Foundation* seemed to recognize that state regulations enacted for purposes other than protection against radiation hazards might nevertheless be within the field occupied by Congress if they substantially controlled radiation hazards. *See supra* note 75.

92. *See supra* note 45 and accompanying text.

93. Marshall v. Consumers Power Co., 65 Mich. App. 237, 251, 237 N.W.2d 266, 276 (1975). *See* Note, *California's Nuclear Power Plant Siting Legislation:*

for purposes other than protection against radiation hazards and would also tend to control these hazards only incidentally. Regulations purposely enacted to control radiation hazards, however, would usually do more than incidentally control such dangers and would therefore be clearly preempted. Given this substantial correlation and the legislative history of section 274(k),[94] courts should hold that federal law preempts state regulations that have more than an incidental effect on the control of radiation hazards, even though the state may have enacted its law for a different purpose.

The traditional occupation preemption considerations also suggest that Congress intended that courts use this incidental effects test to reach the preemption decision.[95] The pervasiveness and complexity of federal regulation of nuclear power is unquestionable; it is one of the few areas of regulation in which the federal government began with exclusive authority.[96] While Congress allowed states to exert more authority over the nuclear industry and the electricity it produced,[97] the federal scheme of regulation also expanded and intensified.[98] In au-

A Preemption Analysis, 52 S. CAL. L. REV. 1189, 1217-19 (1979). In using an inquiry into whether the statute applies to all energy sources or just to nuclear energy as a factor in determining whether the law only incidentally controls radiation hazards, the preemptive effect of section 274 would be similar to the preemptive effect of section 271. *See supra* notes 38, 69.

94. *See supra* notes 88-90 and accompanying text.

95. *See supra* notes 15-20 and accompanying text. In *Northern States*, the Eighth Circuit reasoned that the strength of the federal interest and the need for a uniform national regulatory scheme supported a finding of preemption, *see supra* notes 47-48, 50-51 and accompanying text. The Ninth Circuit in *Pacific Legal Foundation,* however, failed to consider these traditional indicators of congressional intent.

96. *See supra* notes 32-36, 50 and accompanying text.

97. *See supra* notes 38-45 and accompanying text.

98. For example, although the federal government has not determined how to dispose of nuclear waste, federal legislation aimed at controlling these problems has intensified. In addition to the provisions of the Atomic Energy Act of 1954 giving the AEC authority to regulate and to license byproduct and special nuclear material (categories of nuclear waste), 42 U.S.C. §§ 2014(e), 2071-78, 2111-14 (1976 & Supp. III 1979), Congress has also enacted other nuclear waste legislation. *E.g.,* Department of Energy Organization Act, 42 U.S.C. §§ 7101-352 (Supp. III 1979); Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 92 Stat. 3021 (codified in scattered sections of 42 U.S.C. (Supp III 1979)); Transportation Safety Act of 1974, Pub. L. No. 93-633, 88 Stat. 2156 (codified in scattered sections of 45, 46, 49 U.S.C. (Supp. III 1979)); Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1981). Furthermore, bills addressing the need to establish federally owned and operated high-level nuclear waste disposal sites are currently pending in Congress. S. 1662, 97th Cong., 1st Sess., 127 CONG. REC. S10440-46 (daily ed. Sept. 24, 1981); H.R. 3809, 97th Cong., 1st Sess. (1981), *described in* 127 CONG. REC. H2736-41 (daily ed. June 4, 1981). *See also* 10 C.F.R. §§ 30-36, 150.15(a)(4) (1981). *See generally* Hart & Glaser, *A Failure to Enact: A Review of Radioactive Waste Issues*

thorizing these federal regulations, Congress expressed concern for the entire nuclear power cycle, including whether proposed regulations are economically unsound and whether there are adequate plans for nuclear waste disposal.[99] The broad scope of federal nuclear regulation indicates that Congress intended to preempt most state nuclear regulatory authority, and intended to limit the broad exception of section 274(k) by requiring that state statutes falling under that provision no more than incidentally control radiation hazards.

The strength of the national interest in regulating nuclear power also supports this interpretation of section 274(k).[100] Congress has traditionally demonstrated a guarded attitude toward state regulation of nuclear power. Congressional concern has centered on the states' relative incompetence to regulate adequately the complexities of nuclear power.[101] Although California may have avoided the scientific safety decision contemplated by Proposition 15, the very decision to invoke the moratorium required a careful weighing of many complex factors. Moreover, California's judgment that the absence of a demonstrated disposal method creates serious economic uncertainties for the nuclear industry contradicts the findings of Congress.[102] The interstate impact resulting from the state law also creates an overriding national interest in regulating nuclear power. In an age of energy shortages and dependence on foreign energy supplies, the development of nuclear power,

and Legislation Considered by the Ninety-Sixth Congress, 32 S.C.L. REV. 639 (1981); Jaksetic, *Constitutional Dimensions of State Efforts to Regulate Nuclear Waste,* 32 S.C.L. REV. 789, 791-801 (1981).

99. *See* S. REP. NO. 548, 96th Cong., 2d Sess. 17-18, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6933, 6940-41 (Energy and Natural Resources Committee report on the Low-Level Radioactive Waste Policy Act). The NRC continues to view its responsibility for the regulation of nuclear power in broad terms, suggesting a cost-benefit analysis of regulatory alternatives and considering future generations when deciding whether to license a nuclear facility because of its hazardous wastes. U.S. NUCLEAR REGULATORY COMMISSION, *supra* note 42, at 1-2. These broad concerns guarantee that the preemption of state laws enacted for such purposes will not result in the creation of a legislative vacuum. *See supra* notes 15, 31.

100. The following analysis will roughly follow the three factors that Professor Maltz suggested for determining the strength of the national interest. *See supra* notes 17-20 and accompanying text.

101. *See supra* note 44.

102. In contrast to California's determination, the Senate Atomic Energy Committee supported the "finding that technology for storage and disposal which would provide reasonable assurance that waste can be safely disposed of exists and is under development and that adequate disposal facilities can be available when needed." S. REP. NO. 548, 96th Cong., 2d Sess. 17, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6933, 6941. *See also* S. 1662, 97th Cong., 1st Sess. § 101(i), 127 CONG. REC. S10440 (daily ed. Sept. 24, 1981).

now prevented in California, is increasingly becoming a national concern.[103] California's moratorium not only imposes the burdensome effects of a stifled California nuclear industry on the energy producing capabilities of neighboring states, but it also prevents the federal government from freely forming national energy policy.[104] Furthermore, concerns about high-level nuclear waste disposal are not unique to California.[105] Only the federal government can resolve the problems associated with high-level nuclear waste disposal.[106] Hence, the legislative history, pervasive federal regulation, and dominant national interest indicate that Congress intended to allow states to enact laws for purposes other than the control of hazardous materials, but that these statutes must do no more than incidentally control radiation hazards.

Under the incidental effects test, federal law arguably preempts the California moratorium on the certification of nuclear facilities because the state law clearly has more than an

103. Congress passed the Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-5891 (1976 & Supp. III 1979), to help meet future energy needs. "The objective will be to exploit major existing sources of energy and to explore new and advanced ways of producing energy, including consideration of, and research on, closely associated environmental, economic, safety and conservation factors." S. REP. No. 980, 93rd Cong., 2d Sess. 16, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 5470, 5481. Surprisingly, the Ninth Circuit in *Pacific Legal Foundation* cited the Energy Reorganization Act to support a proposition that the federal government was less concerned with the development of nuclear energy than it had been in the past. 659 F.2d at 927. *See supra* notes 81-82 and accompanying text; *infra* notes 131-36 and accompanying text.

104. *See* Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1153 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972). *See also* Boskin & Gilbert, *The Economic Common Sense of Controlling Nuclear Power Development*, *reprinted in* THE CALIFORNIA NUCLEAR INITIATIVE, *supra* note 59, at 37, 38-48.

105. Minnesota v. NRC, 602 F.2d 412, 417 (D.C. Cir. 1979). Despite this commonality of concern, local political pressure has compelled most states to enact some form of legislation controlling the disposition of nuclear wastes. *See, e.g.*, ARIZ. REV. STAT. ANN. § 30-691 (Supp. 1981-82); ME. REV. STAT. ANN. tit. 10, § 253 (1981); MICH. COMP. LAWS ANN. §§ 333.13505-06 (1980); N.Y. PUB. AUTH. LAW § 1854-a.2 (McKinney Supp. 1981); OR. REV. STAT. § 469.525 (1981); WASH. REV. CODE ANN. §§ 70.98.080, 70.121 (1975 & Supp. 1980-81). These statutes and similar laws in other states have already contributed to a myriad of state nuclear waste regulations. *See* Jaksetic, *supra* note 98, at 824-49.

106. High-level nuclear waste is the radioactive material remaining after the nuclear fuel is consumed by nuclear fission. With the exception of spent fuel, which is essentially high-level waste capable of being reprocessed, nuclear facilities solidify high-level waste and transport it to the federal authorities for storage. Currently, deep burial in stable geologic formations is the favored option in developing disposal technology because it reduces the danger of radioactive leakage during the very long periods of necessary isolation. *See* M. WILLRICH & R. LESTER, RADIOACTIVE WASTES: MANAGEMENT AND REGULATION (1977); Lucas, *Nuclear Waste Management: A Challenge to Federalism*, 7 ECOLOGY L.Q. 917, 922-26 (1978).

incidental effect in controlling radiation hazards. Unlike a state regulation, such as a zoning ordinance, that might only incidentally control radiation hazards,[107] the moratorium bans all construction of nuclear plants and thus directly minimizes the radiation hazards they may produce. Whether the moratorium is viewed as a general state regulation of nuclear power, imposing another requirement on nuclear facility certification, or as a specific regulation governing the disposition of high-level nuclear waste, the moratorium more than incidentally controls the radiation hazards of nuclear energy.[108] Such energy specific state regulation[109] thus clearly intrudes into the field occupied by Congress, since the moratorium contradicts Congress's preemptive intent.

Even if the incidental effects test is rejected and the Ninth Circuit's interpretation of section 274(k) is adopted,[110] the analysis in *Pacific Legal Foundation* still fails in two respects. The court's primary error was its failure to recognize the real purpose behind California's moratorium.[111] Although the California legislature purportedly acted on the basis of an economic rationale, the legislature cannot easily separate the moratorium from the public alarm over radiation hazards that provided the impetus for Proposition 15, and, ultimately, for the passage of the moratorium.[112] The California Assembly committee that reviewed Proposition 15 and its legislative alternatives, including the Nuclear Laws, viewed its task as a "reassessment" of the use of nuclear power.[113] Noting the absence of nuclear waste disposal methods, the committee recognized that conclusions regarding the risk of high-level waste rested on "the degree of trust one has in the speculations of the organizations and individuals on each side."[114] The legislation actually enacted was

107. The AEC seemed to recognize that federal law might even preempt zoning regulations that significantly controlled radiation hazards. *See supra* note 89.

108. *Cf.* General Elec. Co. v. Fahner, Nos. 80-C-6835, 81-C-461, slip op. (N.D. Ill. 1981) (state restrictions on high-level waste disposal in the state are within the field preempted by Congress); Washington State Bldg. & Constr. Trades Council AFL-CIO v. Spellman, 518 F. Supp. 928 (E.D. Wash. 1981) (same).

109. *See supra* text accompanying note 93.

110. *See supra* text accompanying notes 68-75.

111. *Cf.* Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (Supreme Court rejected purported health rationale to find state law discriminatory against foreign commerce).

112. *See supra* notes 58-60 and accompanying text.

113. *See* REASSESSMENT, *supra* note 60.

114. *Id.* at 31. As the committee explained:

> To have confidence in the safety of a reactor, we must have confidence in the degree of perfection man can attain in building and operating

on a "middle ground;" the moratorium rejected shutting down existing nuclear power plants, yet it did not allow further unimpeded development.[115] The legislature's economic rationale thus obscures its real concerns regarding the radiation hazards of nuclear power.[116]

The Ninth Circuit also failed to recognize that even the professed economic rationale implicitly assumes that the state must control radiation hazards. The legislature did not say that nuclear power was uneconomical because the state had no need for additional power facilities.[117] Rather, the state found that nuclear power was uneconomical only because of the radiation hazards associated with high level nuclear waste disposal.[118] That finding could not have been reached without assuming the need for and conceptualizing control of these radiation hazards.[119] Whatever the wisdom of California's decision, it is a judgment for the federal government to make; it is the federal government's sole responsibility and prerogative to control radiation hazards.

The Ninth Circuit in *Pacific Legal Foundation* recognized that conflict preemption would occur if the moratorium conflicted with the federal regulation of nuclear energy.[120] Since compliance with both the moratorium and federal law is not impossible, preemption would result only if the moratorium im-

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complex devices. To have confidence in the perpetual isolation of nuclear wastes, we must have confidence in the longevity of our social institutions and the rationality of future generations.

Id. at 95.

115. *Id.* at 103.

116. There are two possible reasons underlying the economic rationale of the California legislature. The legislature may have established that rationale mainly to take advantage of the language of section 274(k) or the growing relevance of the "difference of purpose" factor in preemption analysis. *See supra* note 25 and accompanying text. Professor Tribe acted as Special Counsel for the legislature and was familiar with these legal issues. *See* Tribe, *Memorandum of Law on the Constitutionality of California's 1976 Nuclear Fission Thermal Powerplant Legislation,* in ASSEMBLY SUBCOMMITTEE ON ENERGY, CONSTITUTIONALITY OF CALIFORNIA'S NUCLEAR LAWS vii (1978), *also printed with modification as* Tribe, *supra* note 25.

117. State decisions about the need for additional power facilities typically occur on a case-by-case basis and are based on the economic impact of and need for a particular proposed plant. *See, e.g.,* CAL. PUB. RES. CODE §§ 25511, 25514 (West 1977 & Supp. 1981) (California Energy Commission should consider individual power plant applications in light of projected power needs).

118. *See supra* text accompanying notes 61-64.

119. Significantly, the NRC's approach to resolution of the radiation hazards of high-level nuclear waste disposal includes consideration of the economic implications of potential solutions. *See supra* note 99.

120. 659 F.2d 903, 926-28 (9th Cir. 1981).

peded the attainment of congressional objectives.[121] The objectives of the federal regulation of nuclear power originally were manifested in the AEC's responsibilities for the promotion of the safe use and development of nuclear power as an energy source.[122] The Ninth Circuit, in analyzing whether the moratorium conflicted with the promotional objective of the federal regulation,[123] erred both in its evaluation of the original extent of that objective and the effect of subsequent federal legislation on its validity.

Congress enacted the Atomic Energy Act of 1954 to promote the development of nuclear power as a viable future energy source.[124] In *Pacific Legal Foundation*, the court stated that sections 271 and 274 limited this promotional objective because they gave states authority to regulate nuclear power and prevent faster growth of the industry.[125] Section 271, however, provided no authority for the states to regulate nuclear power; Congress included it in the 1954 Act only to preserve traditional state authority over the electricity produced in nuclear facilities.[126] It limited the federal government's promotional goal only by allowing states to determine that their energy needs were already adequately satisfied.[127] Similarly, section 274(k) did not grant the states significant authority to inhibit the growth of nuclear power. Section 274(k) preserves only the traditional authority that other provisions of section 274, and not the Atomic Energy Act as a whole, might bring into question.[128] Even if section 274(k) preserves state authority from

121. *See supra* notes 22-24 and accompanying text.

122. *See supra* notes 33-37 and accompanying text.

123. 659 F.2d at 926-27. *See supra* text accompanying notes 80-85.

124. *See supra* notes 34-36 and accompanying text.

125. 659 F.2d at 926-27. *See supra* notes 38-45 and accompanying text. The Ninth Circuit said that contrary language used by the Eighth Circuit in Northern States Power Co. v. Minnesota, 447 F.2d at 1154, was dictum, since the challenged state regulation in *Northern States* was clearly within the field occupied by Congress, and a conflict preemption analysis consequently was unnecessary. 659 F.2d at 927 n.39. Disposing of the Eighth Circuit's language in this way, however, may be questionable not only because of the difficulty of clearly distinguishing occupation from conflict preemption, *see supra* notes 12, 22; *infra* notes 130, 136, 146, but also because occupation preemption is broader than conflict preemption. Since occupation preemption may invalidate even "complementary" state laws if they intrude into the exclusive federal field, that holding should be classified as dictum rather than the Eighth Circuit's conflict preemption holding, which only invalidates those laws actually obstructing substantive federal objectives. *See* Catz & Lenard, *The Demise of the Implied Federal Preemption Doctrine*, 4 HASTINGS CONST. L.Q. 95, 304-05 (1977).

126. 42 U.S.C. § 2018 (1976). *See supra* notes 38-39 and accompanying text.

127. *See supra* notes 38-39 and accompanying text.

128. *See supra* note 45. The Ninth Circuit in *Pacific Legal Foundation*

the contrary implications of other sections of the Act, its protection of only those state regulations that have an incidental effect on control of radiation hazards[129] make it much like the grant of section 271, and thus not a serious limitation on the federal Act's promotional objective.[130]

Federal legislation subsequent to the Atomic Energy Act also does not defeat, or even substantially diminish, the federal government's promotional objective. Except for the Clean Air Act Amendments of 1977 and the NRC Authorization Act of 1980,[131] federal legislation plainly supports the further development of nuclear power.[132] These two acts and the Low-Level Radioactive Waste Policy Act[133] were not intended to display any lack of congressional confidence in nuclear energy.[134] Instead, they recognized that the nation must progress in developing all energy sources to maximize domestic energy production.[135] This legislation does not support California's decision to prevent the further development of a substantial energy source.[136]

The Clean Air Act Amendments of 1977[137] authorized states to impose air pollution standards that could close nuclear facili-

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seemed to recognize that the grant of authority in section 274(k) did not conclusively settle the preemption question. *See supra* note 75.

129. *See supra* notes 88-106 and accompanying text.

130. At this point the considerations relevant to occupation and conflict preemption meet. If section 274(k) preempts only state regulations enacted for the purpose of controlling radiation hazards, as the Ninth Circuit suggested, then it would limit the possibility of conflict preemption, because a relatively broad grant of authority would significantly compromise the federal promotional objective.

131. *See infra* notes 137-39 and accompanying text.

132. *See* Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801-91 (1976 & Supp. III 1979); Federal Nonnuclear Energy Research Act of 1974, 42 U.S.C. §§ 5901-17 (1976 & Supp. III 1979). *See also supra* notes 37, 82.

133. Pub. L. No. 96-573, 94 Stat. 3347 (1981).

134. The Ninth Circuit viewed this federal legislation as compromising the promotional goal originally implicit in the Atomic Energy Act. *See* 659 F.2d at 926-27.

135. *E.g.*, S. REP. No. 548, 96th Cong., 2d Sess. 17, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 6933, 6940-41. ("The national need for sufficient energy depends upon a diverse base of primary energy sources which compete on an equal footing and . . . absent a program for waste storage and disposal nuclear energy cannot so compete.") (Senate comments accompanying Low-Level Radioactive Waste Policy Act). *See also supra* note 103.

136. Again, the occupation and conflict preemption lines of inquiry stand on the same ground. *See also supra* note 130. The federal government's interest in securing a potential energy supply for the nation is a strong factor in defining the field of occupation preemption, and now in establishing the objectives to be considered in a conflict preemption analysis.

137. Pub. L. No. 95-95, 91 Stat. 685 (1977) (codified in scattered sections of 42 U.S.C. §§ 7401-7462 (Supp. III 1979)).

ties,[138] and thus indicates a congressional limitation on the promotional objective of nuclear energy. The scope of that Act, however, is narrow, suggesting that Congress has not abandoned the promotional objective altogether, but has emphasized the safety objective in regulating the carefully circumscribed area of radioactive air pollution.[139] It is presumptuous to contend that this limited federal legislation destroys a long-standing promotional objective indirectly affirmed by other recent legislation.[140] California's moratorium unquestionably inhibits further development of nuclear power in California, and thus is an obstacle to attaining the federal promotional objective.[141] This obstruction of a federal objective puts the state law in preemptive conflict with federal law.

The Ninth Circuit in *Pacific Legal Foundation* failed to discuss one consideration that may mitigate this apparent preemptive conflict. The Supreme Court has indicated that in some circumstances different purposes behind state and federal laws may prevent preemptive conflict.[142] Assuming that the California moratorium rested on the purported economic rationale,[143] and that federal regulation does not rest on economic concerns,[144] federal and state regulations would have different purposes. Yet the difference of purpose consideration applies only if the conflict is incidental.[145] By halting all new construction of nuclear plants, the California moratorium significantly conflicts with the federal law's promotional goal, and completely nullifies one of Congress's objectives. Thus, the difference of purpose consideration should not exempt Califor-

138. *See supra* note 83.

139. The same argument is applicable to the interpretation of the NRC Authorization Act of 1980, Pub. L. No. 96-295, 94 Stat. 780, which authorizes the states to impose nuclear facility siting and land use requirements more stringent than those of the NRC. The law's limitation on the promotion of nuclear energy only represents a federal decision that in this specific area the proper balance has moved close to the safety objective.

140. 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION §§ 45.10, 51.01-.02 (4th ed. 1973) (a revision of *Sutherland Statutory Construction*).

141. *Cf.* Natural Resources Defense Council v. NRC, 582 F.2d 166 (2d Cir. 1978) (NRC not required by the Atomic Energy Act to suspend licensing activities until waste disposal methods are approved).

142. *See supra* note 25 and accompanying text.

143. *But see supra* notes 110-19 and accompanying text.

144. Recent federal legislation, however, seeking to develop all energy sources may rest primarily on an economic decision of Congress that in the long run this development is necessary for a healthy and independent national economy. *See supra* notes 132-36 and accompanying text. Other federal legislation, such as the Price-Anderson Act, *see supra* note 73, also clearly rests on economic concerns.

145. *See supra* text accompanying note 26.

nia's law from invalidation because of conflict preemption.[146]

Finally, "state supportive presumptions" against finding preemption do not make preemption of the California moratorium inappropriate.[147] The absence of traditional state authority over nuclear energy regulation[148] ensures that defining occupation preemption to invalidate all state laws more than incidentally controlling radiation hazards does not impose a judicial interpretation that Congress did not intend. Moreover, the strong federal interest in domestic energy production, which supports a finding of conflict and occupation preemption,[149] guarantees that conflict preemption of the California moratorium will not unnecessarily foreclose state regulation.[150]

In affirming California's decision to halt nuclear power development until the federal government approves a method of high-level nuclear waste disposal, the Ninth Circuit in *Pacific Legal Foundation* tipped the scales of federalism toward increased state authority. In this failure to find federal preemption, the Ninth Circuit subjected important national interests to the dictates of state decision-makers. California's moratorium provision prevents a balanced national approach to satisfying increasing energy needs, and imposes on other states the burden of readjusting their own energy consumption patterns. *Pacific Legal Foundation* encourages other states to regulate nuclear power and nuclear waste disposal, making possible a myriad of state regulations that will drastically affect national energy policy. These inevitable consequences do not necessarily indicate that California's moratorium on nuclear power development was unreasonable; it may be advisable to postpone further expansion of the nuclear industry until the uncertain-

146. For the third time, the considerations relevant to conflict preemption have mirrored occupation preemption considerations. *See supra* notes 130, 136. In this instance, the difference of purpose consideration rests on two factors: whether the overlap between federal and state laws is only incidental, the very test recommended in the occupation preemption analysis, *see supra* text accompanying note 94, and whether the difference of purposes indicates that a preemption holding would result in a judicially created legislative vacuum, also a consideration in the occupation preemption analysis. Preempting the California moratorium will not likely result in the non-regulation of nuclear waste disposal or the economics associated with such disposal. *See supra* notes 98-99 and accompanying text.

147. *See supra* notes 27-31 and accompanying text.

148. The traditional state authority that Congress recognized in section 271 of the 1954 Act encompassed only a state's authority to regulate the power produced in nuclear facilities. 42 U.S.C. § 2018 (1976). *See supra* notes 38-39 and accompanying text.

149. *See supra* note 136.

150. *See supra* note 31 and accompanying text.

ties of nuclear waste disposal are remedied. Nevertheless, Congress has indicated that the federal government must make that decision. Both the occupation and conflict theories of preemption invalidate California's moratorium.